CHAN KIT HONG & ANOR.

v.

JAYAKUMAR M. KUPPUSAMY & ANOR.

FEDERAL COURT, KUALA LUMPUR
WAN SULEIMAN FJ
MOHD. AZMI FJ
HASHIM YEOP SANI FJ
[CIVIL APPEAL NO. 231 OF 1983]
26 MAY 1984

TORT: *Negligence - Damages - Claim for indemnity and contribution against 1st respondent - Order 16 r. 8(1)(a), Rules of the High Court 1980 - Whether maintainable.*

The respondents sued the appellants for negligence arising out of a collision between a motor car driven by the 1st respondent and in which the 2nd respondent was a passenger and a motor lorry driven by the 1st appellant. A notice of indemnity and contribution under O. 16 r. 8(1)(a) of the Rules of the High Court was filed by the appellants against the 1st respondent. The appellants claimed to be entitled to contribution from any sum which the 2nd respondent might recover from the appellants, to the extent of the 1st respondent's liability. When the action came for trial, the parties by consent agreed on liability. As between the 1st respondent and the appellants, it was agreed that the former was 20 per cent to blame. Regarding the 2nd respondent, the appellants admitted a 100 per cent liability and were ordered to pay RM230,871.92 general and special damages with interest and costs. The Trial Judge rejected the appellants' claim for contribution, that 20 per cent of the award must be recovered by the 2nd respondent direct from the 1st respondent. The appellants appealed.

Held:

[1] Section 10 of the Civil Law Act 1956 should enable the appellants to recover as it applies to any tortfeasor, joint or separate.

[2] However, the appellants should have proceeded under O. 15 r. 2 and counterclaimed.

[Appeal dismissed with costs]

Cases referred to:

Croston v. Vaughan [1938] 1KB 540
Lampert & Anor. v. Eastern National Omnibus Co. Ltd. [1954] 2 All ER 719
Oli Mohamed v. Keith Murphy & Anor. [1969] 2 MLJ 244
Mallet & Anor. v. Dunn [1949] 1 All ER 973
Drinkwater & Anor. v. Kimber [1952] 2 QB 281

Legislation referred to:

Civil Law Act 1956 (Act 67), ss. 10, 12
Law Reform (Contributory Negligence) Act 1945 [UK], s. 1(1)
Law Reform (Married Women and Tortfeasors) Act 1935 [UK], s. 6(2)
Rules of the High Court 1980, O. 15 r. 2, O. 16 r. 8(1)(a).

For the appellants - Jagjit Singh; M/s. Jagjit Singh & Co.
For the respondents - Sri Ram; M/s. Sri Ram, Zulkifly & Kumar

JUDGMENT

Wan Suleiman FJ:

The first and second respondents had sued the appellants for negligence arising out of a collision between motor car BAF 996 driven by the first respondent in which the second respondent was a passenger, and motor lorry BAX 1378 driven by the first appellant.

Solicitors for the appellants duly filed a notice of indemnity and contribution against the first respondent claiming to be entitled to contribution from any sum which the second respondent might recover from the appellants to the extent of first respondent's liability. This notice was in accordance with Rules of the High Court, O. 16 r. 8(1)(a).

When the action came for trial, the parties by consent agreed on liability as between the first respondent and the defendants, the former was 20 per cent to blame. As for the second respondent, the appellants admitted a 100 per cent liability, and they were in due course ordered to pay the second respondent the sum of RM230,871.92 general and special damages with interest and costs.

Further arguments were then heard on appellants' claim for contribution against the first respondent. Counsel for the appellants contended that they were liable to pay to second respondent only 80 per cent of the total award and that the balance of 20 per cent must be recovered by the second respondent direct from the first respondent. The learned Judge held that they could not.

Mr. Jagjit Singh for the appellants referred us to the case of *Croston v. Vaughan* [1938] 1 KB 540, an authority which was apparently not cited in the Court below.

There, the plaintiff was injured in an accident by the negligence of the drivers of two motor vehicles. The trial Judge held that one of the defendants Mrs. B was chiefly to blame, that she was negligent in pulling up violently and faster than a car usually does, and accordingly ordered that Mr. B should pay two-thirds of the damages and costs and another defendant one-third.

An application was then made under s. 6(2) of the Law Reform (Married Women and Tort-feasors) Act, 1935 for contribution. Sub-section (2) reads:

> In any proceedings for contribution under this section the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage ...

Before the Court of Appeal it was argued on behalf of Mrs. B that the expression "proceedings for contribution" in that subsection does not mean proceedings in the action for damages, but subsequent proceedings and that therefore the Judge had no jurisdiction to entertain it and to give a decision upon it. The Court of Appeal held that the trial Judge had jurisdiction at the end of the proceedings in which it had been held that the plaintiff was entitled to recover, to entertain an application to apportion the blame between the two joint tort-feasors, and that it was not necessary that separate formal legal proceedings should be instituted for that purpose.

Section 6 of the English Act is in *pari materia* with our Civil Law Act 1956 (Act 67).

In *Lampert & Anor. v. Eastern National Omnibus Co. Ltd*. [1954] 2 ALL ER 719 a husband and wife, Mr. & Mrs. Lampert filed an action in respect of injuries sustained by the wife as a result of a collision between a motor car driven by her husband in which she was travelling,

and which was owned by her, and a motor bus, property of the defendants and driven by their servant. The Court found that the accident was due to the negligence of both drivers and that each was equally at fault. It held that being the owner of the car and having delegated the driving to him, and being seated by him at the time of the accident, she had the right to control his driving and the duty to do so if he was driving unlawfully and (ii) she was thus to be considered responsible herself for one half of the damage which she had suffered.

However, Counsel frankly conceded that there are authorities against him. In *Oli Mohamed v. Keith Murphy & Anor*. [1969] 2 MLJ 244 1st and 2nd defendants each drove their respective vehicles so negligently against one another that both vehicles thereafter collided with and caused damage to plaintiff's premises. 1st defendant did not enter an appearance and was absent at the trial.

The Court found that both drivers had been equally negligent, and that as plaintiff was an innocent 3rd party, it was enough for him to prove negligence against the 2nd defendant even if it was not the whole of the negligence. By common law plaintiff was entitled to recover the whole of the damages awarded.

In *Mallet & Anor. v. Dunn* [1949] 1 All ER 973, the wife Mrs. Mallet was knocked down and injured by the defendant's car whilst she was walking along a lane. Hilbury J found that the defendant had been guilty of negligence, but that the wife had also been at fault and he reduced the award for personal injuries accordingly.

On the husband's claim for special damages in respect of medical and household expenses he held that the husband's right of action was not defeated by the wife's contributory negligence and that no reduction of this amount fell to be made under the Law Reform (Contributory Negligence) Act 1945, s. 1(1), which is in *pari materia* with s. 12 of our Civil Law Act 1956 (Act 67).

However, we note that in *Mallet's* case the husband's claim was for special damages for medicine and household expenses. The husband's cause of action was personal to him and distinct.

Learned Counsel for the respondents drew our attention to the case of *Drinkwater & Anor. v. Kimber* [1952] 2 QB 281, the principles of which are we think, applicable to the present appeal.

There a motor van driven by the male plaintiff, in which the female plaintiff, his wife, was a passenger, collided with a motor car driven by the defendant. In the subsequent action the female plaintiff claimed damages for personal injuries and the male plaintiff for loss and expenses. The defendant pleaded by his counterclaim:

> If, contrary to the defendant's contention, the defendant is held to have been guilty of negligence contributing towards the happening of the matters complained of, so that he is adjudged to pay damages to the female plaintiff, the defendant will contend that he has suffered damage within the meaning of s. 1 of the Law Reform (Contributory Negligence) Act 1945, caused partly by his own fault and partly by the fault of the male plaintiff.

The defendant paid money into Court in respect of the claim of the male plaintiff which was taken out in satisfaction by him, and he remained in the action as defendant to the counterclaim.

The trial Judge found that responsibility for the collision lay as to two-thirds on the defendant and as to one-third on the male plaintiff. He awarded the female plaintiff £405 damages for personal injuries against the defendant, who counter claimed for one-third of that sum £135 against the male plaintiff under s. 1(1) of the Law Reform (Contributory Negligence Act 1945, whilst admitting that he could not recover this sum from the male plaintiff under s. 6 of the Law Reform (Married Women and Tort-feasors) Act 1935, since the two plaintiffs were husband and wife.

It was held, that the cause of action claimed was not available to the defendant under s. 1(1) of the Act of 1945 and further that what the defendant claimed from the male plaintiff was not "damage" within the meaning of the subsection.

The defendant was a separate and not a joint tortfeasor. If the defendant by his counterclaim against the male plaintiff had alleged damage done to his motor car, on the Judge's findings, he would have been able to recover one-third of the damage to his car. But by the counterclaim pleaded, it was not alleged that because of the male plaintiff's negligence, the defendant was caused to be negligent towards the female plaintiff nor was that proved, and so the defendant failed to establish that the male plaintiff's negligence caused the loss of which he complained. In effect, the defendant claimed to have suffered damage because he had been held liable to have caused damage. Section 1(1) of the Law Reform (Contributory Negligence) Act 1945 did not bring into existence any new variety of claim. That subsection merely removed an obstacle to a claim made by a person who had suffered damage as the result in part of his own fault.

Since the plaintiffs in the present case under appeal are not husband and wife s. 10 of our Civil Law Act (s. 6 of the Law Reform (Married Women and Tort-feasors) Act 1935) should enable the defendant to recover because it applies to any tortfeasor, joint or separate.

Mr. Sri Ram thinks that defendant should counterclaim, presumably against the first plaintiff as in *Drinkwater's* case. He was of course referring to the requirement set out in O. 16 r. 8(2) which states, "Where a defendant makes such a claim as is mentioned in para. 1 and that claim could be made by a counterclaim in the action, para. 1 should not apply in relation to that claim." Paragraph 1 refers to the notice which it issued to the plaintiffs. Since what he claims from first plaintiff should properly be made a counterclaim under O. 15 r. 2, we agree with Counsel. The decision in *Croston's* case is different because there the application for contribution is against a co-defendant.

The defendant therefore should have filed a counterclaim. Accordingly this appeal is dismissed with costs here and in the Court below.

Also found at [1985] 1 CLJ 127